Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

October Term, 1993

ROBERT J. HENDERSON, Superintendent,

Petitioner,

- against -

MAURICE MAYO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 9, 1994

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QUESTIONS PRESENTED

1. In a habeas corpus proceeding, may a claim of ineffective assistance of appellate counsel be premised on counsel's failure to present a state-law claim that was recognized only after the defendant's state appeal?

2. Does the Second Circuit's approach to ineffective assistance of counsel conflict with this Court's approach to "new rule" jurisprudence?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

PRELIMINARY STATEMENT

Robert J. Henderson, Superintendent, seeks a writ of certiorari to review a January 3, 1994, order of the United States Court of Appeals for the Second Circuit affirming the grant of a writ of

habeas corpus under 28 U.S.C. section 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated January 3, 1994, concluding that respondent Maurice Mayo received ineffective assistance of appellate counsel is set forth in the accompanying appendix at pages Pet. App. 3 to 45, and is reported at 13 F.3d 528. The judgment and opinion of the District Court, dated June 23 and June 14, 1993, respectively, also concluding that respondent Mayo received ineffective assistance of appellate counsel, is set forth in the accompanying appendix at pages Pet. App. 46 to 48, and 49 to 67, respectively. The

opinion of the District Court is also reported at 1993 U.S. Dist. LEXIS 8100.

JURISDICTION

The Order of the Court of Appeals was entered on January 3, 1994. An application for a rehearing and suggestion for rehearing in banc was denied on March 11, 1994 (Pet. App. 1-2). This Court's jurisdiction is being invoked under 28 U.S.C. section 1257 (a), and Rules 13.1 and 13.4 of the Rules of the Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI of the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.

Amendment XIV, Section 1, of the United States Constitution, provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

A. The State Trial and Appeal

In 1980, respondent Mayo and John Buster were charged with one count of Robbery in the First Degree and two counts of Robbery in the Second Degree for the robbery of Aquilino Benitez.

The trial began on March 13, 1981. The testimony of Benitez, a Columbia University student, established that on September 20, 1980, Mayo and Buster robbed him at gunpoint and knifepoint in the elevator of his apartment building.

Benitez described his assailants, identified them in court, and testified to his identification of them in a lineup held eight days after the robbery. Benitez further identified a distinctive ring stolen from him, and recognized a black-handled knife and a silver starter's pistol as the robbery weapons. The government established that the ring and pistol were recovered from Mayo when Mayo was arrested, and that the knife was on Buster when Buster was arrested eight days after the robbery.

Mayo called no witnesses. Buster, his co-defendant, called two police witnesses and attempted to impeach Benitez' identification testimony through certain entries in the officers' routine police reports.

Mayo and Buster were convicted and pursued separate appeals. Mayo's attorney perfected Mayo's appeal first, filing a lengthy brief that presented eight claims in support of reversal of Mayo's conviction. On April 12, 1984, the Appellate Division unanimously affirmed Mayo's conviction. 100 A.D.2d 983, 474 N.Y.S.2d 157. On May 30, 1984, then-Associate Judge Judith S. Kaye denied Mayo leave to appeal. 62 N.Y.2d 808, 477 N.Y.S.2d 1033, 465 N.E.2d 1276.

With the benefit of the unsuccessful issues presented by Mayo, Buster then perfected his appeal. Amongst his claims was one that arose from an effort by the prosecutor, during the cross-examination of the police officers called by Buster, to show that their memo book entries

reflected a description of the robbers more consistent with that given by Benitez at trial than the description later recorded in other police reports. Objection had been made to the cross-examination on the ground that New York law had required disclosure of the memo book entries to the defense before the officers took the stand. The trial judge agreed, struck the cross-examination testimony relating to the memo book entries, and vigorously charged the jury that the memo books provided nothing inconsistent with the testimony of the defense witnesses.

Buster's appellate argument was that as a matter of state law "harmless error" analysis was impermissible with respect to the discovery claim, and accordingly that

he was entitled to a new trial despite the trial court's corrective actions. On April 23, 1985, the Appellate Division unanimously rejected Buster's argument and affirmed Buster's conviction. 110 A.D.2d 1093, 488 N.Y.S.2d 942.

Buster was permitted a further appeal to the New York Court of Appeals. On December 19, 1986, that court sided with Buster. After discussing prior extensions of New York's discovery rules, the court made a sweeping holding that harmless error analysis would not be applied when the prosecution fails to meet its disclosure obligations. 69 N.Y.2d 61, 511 N.Y.S.2d 580, 503 N.E.2d 1011.

Mayo's counsel, discovering the outcome of Buster's appeal, moved for reconsideration of his prior application

for discretionary review by the New York Court of Appeals. However, on March 30, 1987, Judge Kaye again denied Mayo leave to appeal. 69 N.Y.2d 883, 515 N.Y.S.2d 1031, 507 N.E.2d 1101. Three months later, Mayo filed a petition for a writ of error coram nobis in the Appellate Division, claiming that his attorney's failure to raise the discovery claim in the initial appeal had constituted ineffective assistance of counsel. The Appellate Division denied the petition, 134 A.D.2d 205, 520 N.Y.S.2d 721, and the New York Court of Appeals later dismissed Mayo's application for permission to appeal. 70 N.Y.2d 957, 525 N.Y.S.2d 841, 520 N.E.2d 559.

B. The Federal Habeas Corpus Proceedings

Mayo thereafter filed a pro se petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. Not in the original petition, but later added to it, was the claim that he had received ineffective assistance of appellate counsel.

An evidentiary hearing on "the reasons counsel failed to raise the Rosario[1] claim and the practice of the New York defense bar regarding such claims" (see Pet. App. 162-163) was held on May 28, 1992. It was stipulated that Mayo's

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[1]The New York disclosure rule, later codified, had originated in the case of People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881, cert. denied, 368 U.S. 866 (1961).

appellate attorney did not remember why he had not raised the discovery claim. Two expert witnesses testified. Stanley Neustadter, a law professor and private attorney, opined that there had been no reason not to litigate the claim, but admitted that there was a "cloud of inconsistent decisions" on whether a "no harmless error" rule was the law in New York when Mayo's appeal was being perfected. Mark Dwyer, Chief of the Appeals Bureau of the New York County District Attorney's Office, testified that at the time Mayo's appeal was perfected there was no clearly established "no harmless error" rule for the failure to disclose witness statements.

Thereafter, Magistrate Judge Leonard Bernikow recommended that Mayo's petition

be granted, concluding that his appellate attorney should have foreseen the expansion of New York's discovery rule to require reversal without consideration of harmless error principles (Pet. App. 68-101). Notwithstanding the state's objections,[1] District JudgeLawrence M. McKenna concluded that federal habeas corpus relief should be granted (Pet. App.

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[1]The state pointed out that (1) when Buster's counsel raised the Rosario claim, the intermediate New York appellate court unanimously rejected it; (2) Mayo had been rebuffed by the New York Court of Appeals when he sought the benefit of the rule established in Buster's appeal; (3) the intermediate New York appellate court unanimously rejected Mayo's claim that appellate counsel had been ineffective for not anticipating this development of New York law; and (4) Mayo had failed to prove that which he had been accorded a hearing to prove, i.e., that at the time of Mayo's appeal the defense bar routinely was raising claims like the one Mayo's counsel had been disparaged for not raising.

49-67). Judge McKenna also rejected the state's argument that the magistrate had ignored the Court's opinion in Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), that, for purposes of ineffective assistance claims, prejudice involves a determination of whether the result of the underlying proceeding was "unfair or unreliable," not whether "the outcome would have been different" (Pet. App. 64-65).

The Second Circuit Court of Appeals affirmed the grant of federal habeas corpus relief, holding that the New York Court of Appeal's "eventual ruling [in Buster's appeal] was easily predictable" (Pet. App. 28). The Second Circuit directed Mayo's release from custody unless within 90 days he was afforded a

retrial or was permitted to present his Rosario claim to the "appropriate New York State court ... as if it were properly and timely presented" (Pet. App. 45).[1]

REASONS FOR GRANTING THE WRIT

The ruling presents a critical issue of federal habeas corpus jurisprudence: are federal courts free to interfere with state criminal judgments by imposing their own views of what state rules mean? This Court has repeatedly pronounced that

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[1]No stay has been granted. To avoid Mayo's release from parole the People of the State of New York asked the Appellate Division, First Department to recalendar his appeal. That request was granted and the appeal is scheduled for oral argument on June 10, 1994. It is respondent's position that this appeal will not be mooted by these proceedings unless and until Mayo's appellate claims are finally rejected by the state courts.

federal habeas corpus courts are not to grant relief based upon interpretations of state law. E.g., Estelle v. McGuire, 502 U.S. ___, 112 S.Ct. 475, 480, 481, 116 L.Ed.2d 385 (1991). But here, under the rubric of ineffective assistance of counsel, the lower courts have done just that. They have granted relief to a petitioner based on their view that in 1994 (without relying on hindsight) they know more about what New York law was a decade ago than did either Mayo's appellate attorney, or the panel of the New York Appellate Division that heard and rejected Buster's appeal in 1985.

A. Whether Federal Courts Exercising Habeas Corpus Jurisdiction May Interfere With A State Conviction By Finding A Criminal Defendant's Attorney At Fault For Failing To Anticipate The Development Of State Law Represents An Important Question.

That federal courts may not grant habeas corpus relief for errors of state law committed by state courts would have seemed clear beyond dispute. The Court has made that clear emphatically, consistently, and recently. Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385. That rule necessarily derives both from the fact that federal habeas corpus review is limited to errors arising out of federally-granted rights and the fact that the state courts are better able to determine the status of state law than federal courts. Equally

plain is that the federal right to effective assistance of counsel does not provide a back-door method for obtaining redress for arguable failures of state courts to recognize state-law errors.

But that is how the right to effective counsel was employed here. Mayo's essential complaint is that under state law he was entitled to a retrial even if a discovery error was harmless, and thus that the state trial court should not have granted him lesser relief than a mistrial. Of course, a habeas corpus court could not grant relief on such a state-law claim. Mayo therefore has argued in federal court that his appellate attorney should have predicted the "no harmless error" rule and argued the point to the Appellate Division. But on the appeal of co-

defendant Buster, not even the Appellate Division was able to predict that the New York Court of Appeals would later announce a "no harmless error" rule for this type of discovery violation.

It could not have been impermissibly ineffective for Mayo's attorney to hold the same opinion of state law as the trial court and the Appellate Division. The finding of the lower federal courts that subsequent developments in New York law were so readily "predictable" that the attorney was constitutionally ineffective represents nothing less than a finding that the federal courts can correct the state trial court and the state Appellate Division for errors of state law.

Nor is this case an isolated incidence of federal intrusion on matters that

should be left to New York's courts. In 1992 as well, the Second Circuit held that an attorney had been ineffective in not raising what the Second Circuit speculated was a valid claim under New York law. Claudio v. Scully, 982 F.2d 798 (2d Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993). And, the Second Circuit, just recently, again analyzed an ineffective assistance claim based upon its perceptions of what the status of state law was at a particular point in time. Jameson v. Coughlin, ___ F.3d ___, Slip Op., Appeal No. 1166, 1994 U.S. App. LEXIS 11828 (2d Cir. April 13, 1994).

Indeed, the Second Circuit persists in these efforts to second-guess state determinations of issues of state law

notwithstanding the fact that it concedes that it has "not always been successful in predicting" how state law would develop. Id., Slip Op. at 3223 fn, 119 U.S. App. LEXIS 11828 *9. Indeed, after the Second Circuit's Claudio decision, the New York Court of Appeals rejected the Second Circuit's view of state law. People v. Claudio, 83 N.Y.2d 76, 607 N.Y.S.2d 912, 629 N.E.2d 384 (1993).

Thus, the Second Circuit, under the rubric of determining ineffective assistance of counsel claims, has made a practice of second-guessing state appellate interpretations of state law and engaging in "predictions" of state law. That practice strikes at the heart of the relationship between state rights and federal authority and directly impacts on

the states comprising the Second Circuit's jurisdiction. It results in the disruption of orderly state processes, and adds to the burdens of criminal law enforcement by freeing the guilty in collateral proceedings under a thinly veiled "hindsight" analysis.

B. The Second Circuit's Rule Circumvents Settled Precedent And Conflicts With The Court's Habeas Corpus "New Rule" Principles.

The rule followed by the Second Circuit circumvents fundamental principles that limit the grant of collateral relief to the status of the law at the time of the events, and not upon how the law later develops.

The standards applicable to ineffective assistance of counsel claims are easily stated. There are, of course,

two prongs that must be met by the criminal defendant raising such a claim. First, the attorney must have provided representation that was "outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690, 691-692 (1984). Second, the criminal defendant must have suffered prejudice in the sense that the result of the proceeding was fundamentally "unfair" or "unreliable." Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 842, 122 L.Ed.2d 180, 189 (1993).[1]

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[1]The state hotly litigated prejudice below. Given the overwhelming identification evidence and physical evidence of guilt, including Mayo's possession of some of the stolen property when arrested, the judgment of conviction was neither "unfair" nor "unreliable." Moreover, had Mayo raised the discovery claim in the only appeal he had as of right, there is no reason to believe that

(continued...)

To meet the first prong, the attorney must be guilty of "gross incompetence." Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Competence must be presumed, and one cannot base relief upon hindsight. Lockhart v. Fretwell, ___ U.S. at ___, 113 S.Ct. at 844, 122 L.Ed.2d at 190. Rather, the attorney's conduct must be "viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. at 690. In considering the conduct of an appellate attorney, it is not enough that he or she

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[1](...continued)
the intermediate appellate court would not have rejected it -- just as was done when Buster raised it. Thus, had Mayo's attorney raised the claim in the intermediate appellate court, there is no "reasonable probability" that the outcome of that proceeding in 1984 would have been different. Strickland v. Washington, 466 U.S. at 694.

did not raise every nonfrivolous claim. Jones v. Barnes, 463 U.S. 745 (1983).

As to the first prong, there can be no question that the Second Circuit engaged in hindsight that was motivated by the co-defendant's ultimate success in the New York Court of Appeals well after Mayo's direct appeal was concluded. Only hindsight explains a finding of ineffectiveness for failure to raise a claim that was unanimously rejected, when later raised by the co-defendant, by the only court to which that Mayo had an appeal as of right.

To avoid the proscription against "hindsight," the Second Circuit concluded that the development of a "no harmless error" rule should have been "easily predictable" by Mayo's attorney. But an

effective assistance standard predicated on "predicting" creates a result that is grounded in neither fact nor law, but in speculation. Such a standard is nothing but a subterfuge for the application of hindsight. Whether federal courts may require that state judgments be set aside if appellate attorneys lack clairvoyance as to future state law developments is a fundamentally important question.

Indeed, the approach of the Second Circuit is dramatically at odds with this Court's "new rule" jurisprudence. A substantive constitutional violation entitles a defendant to relief on federal collateral review only if the constitutional right was firmly established at the time the conviction became final. However, under the Second

Circuit's approach, the elusive right to effective assistance of counsel permits collateral federal relief where the attorney did not foresee the establishment of future rights under state law or federal law.

More particularly, regardless of whether imaginative claims have been pressed by imaginative counsel, convictions are not set aside on collateral federal review unless the federal constitutional principle in issue was "dictated" or "compelled" by precedent. E.g., Graham v. Collins, 506 U.S.___, 113 S.Ct. 892, 897-898, 122 L.Ed.2d 260, 270 (1993). Moreover, the Court has concluded that this means that "reasonable, good-faith interpretations of

existing precedents made by state courts" should be validated. Id.

The Second Circuit has neatly circumvented that limitation in habeas corpus review. It has created a rule that requires not courts, but attorneys, to "predict" developments in the law or be branded ineffective. And that label can set the criminal free. Thus, in New York a federal court may grant habeas corpus relief when an appellate attorney has decided what claims to present by looking to established precedent rather than trying to "predict" the future.

This Court has said that a finding of ineffectiveness cannot be premised on later changes in the law. The Court has said that ineffectiveness must be gauged by the circumstances "as of the time of

counsel's conduct." Strickland v. Washington, 477 U.S. at 690. That is fundamentally inconsistent with ephemeral notions based upon predictions, regardless of how "easily" those predictions are made after the fact, and if later developments in state rules might have been of benefit to a criminal defendant.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should either summarily vacate the judgment of the Second Circuit Court of Appeals and remand for further consideration or direct full briefing and argument on the issues presented in this petition.

Respectfully submitted,

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